Supreme Court, U.S.
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No. 91-619

In The
Supreme Court of the United States
October Term, 1991

TONY AVIRGAN and MARTHA HONEY,

Petitioners,

v.

JOHN HULL, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit

REPLY BRIEF FOR PETITIONERS

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Although there are three separate petitions before this Court -- this one filed by plaintiffs, another filed by Daniel Sheehan, and another filed by his law firm, the Christic Institute -- respondents, like the lower courts, often fail to differentiate among them in both their brief in opposition to certiorari ("Opp.") and their opposition to the motions for leave to file *amicus* briefs in support of certiorari. Because most of the opposition is directed at Sheehan and Christic, this reply will be quite brief.

The principal problem with the effort of respondents to defend the sanctions imposed against plaintiffs is that most of what they offer was not adopted by the lower courts. As we explained in our petition at 5-8, the primary basis on which plaintiffs were sanctioned is that they "must have known" when the complaint was filed that there was no "competent" (*i.e.*, admissible) evidence to support their claim. They had a great deal of what non-lawyers would understand to be "competent evidence," but, as the district court's grant of summary judgment makes clear, that was neither enough, nor what the court thought

was necessary when it imposed sanctions. It was their failure to have admissible evidence when they filed which led to the sanctions imposed by the district court for their "bad faith," and which the court of appeals relied on when it affirmed because "appellants [including clients and lawyers] knew (must have known) prior to filing this lawsuit that they had no competent evidence . . .." Pet. App. 21a.

In an apparent recognition that clients who are not attorneys can not be held liable under the bad faith exception for what is, in essence, a failure to recognize the difference between admissible and inadmissible evidence, respondents seek to justify the sanctions award under several alternative theories.* First, they attempt to make much of the fact that Christic paid plaintiffs while the lawsuit was pending (Opp. 23, 25), but fail to inform the Court that much of it was for reimbursement of travel and other out-of-pocket expenses, and the rest was compensation for services rendered in continuing the investigation and speaking on Christic's behalf. More importantly, the district court never mentioned these payments in the portion of its original fee opinion explaining the basis for its ruling (Pet. App. 24a-26a), but simply included one sentence in its "Clarifying Order" noting the payment, but not attempting to explain its relevance to the $1 million award (*id.* 44a). Moreover, the court of appeals never mentioned it at all (*id.* 18a-23a). Under those circumstances, it cannot be the basis to sustain this sanctions award.

Next, respondents argue (Opp. 24) that the complaint went far beyond the incident at La Penca, for which plaintiffs conducted an extensive investigation. Issues of relevance and of responsibility for the expansion of the complaint aside, neither lower court even mentioned the point, let alone relied on it as a basis for imposing a sanction. And, as to their "continued participation" as a basis for the sanction (*id.*), that did not included any direct participation in the litigation or the signing of any papers

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* Respondents do repeat the "failure to produce witness" charge made by the district court (Opp. 23), but that is simply a paraphrase of the district court's "no competent evidence" ruling, which cannot properly be applied to lay clients.

filed in court. Thus, like the prior efforts at saving the decision below, these too cannot serve that function because the sanctioning court did not rely on them for its finding of bad faith.

But even if the plaintiffs had done everything of which they stand accused by respondents, and the lower courts had relied on all of it, their conduct would not constitute bad faith as any other court has defined it. The contrast is most stark when the activities giving rise to sanctions here are compared with those that formed the basis of the fee award in *Chambers v. NASCO, Inc.*, 111 S. Ct. 2123 (1991), a case which respondents note (unlike the court of appeals), but whose significance they miss. Of course, *Chambers* stands for the proposition that clients can be sanctioned for bad faith litigation; the question is, what conduct is necessary before a finding of bad faith can properly be made? It is that aspect of *Chambers* that is so radically different from this case. Thus, it is the ease with which both lower courts here reached the conclusion that virtually any mistake in litigation, even one made by the client's lawyer, can be ascribed to the client and become the basis for a $1 million bad faith sanctions award, that is the principal reason why this Court should grant review.

Respectfully submitted,

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